Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

JOSEPH R. CAMPBELL and MARILYN L. CAMPBELL,

Petitioners,

v.

RAINBOW CITY, ALABAMA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The jury, as well as the district court judge, found that there was sufficient convincing evidence to conclude that the "real decision maker" in this case acted with an unconstitutional animus. Implicit in the questions below is whether the Eleventh Circuit, contrary to other Circuit Courts, may create an artificial barrier to effectively insulate wrongdoing by municipal officials in power.

1) Whether the Eleventh Circuit Court of Appeals erred in reversing the United States District Court, Northern District of Alabama, Middle Division's denial of the Defendants Rule 50 motion?

2) Whether the Eleven Circuit erred in not recognizing the testimony of the Plaintiffs' Expert witness?

3) Whether the Eleventh Circuit ignored facts and misinterpreted this case and so far departed from the accepted and usual course of judicial proceedings that a summary reversal should be issued.

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Petitioner, Joseph R. and Marilyn L. Campbell, respectfully prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

In this case concerning the Respondents' violations of the Petitioners' First and Fourteenth Amendment rights, the District Court upheld a jury verdict in favor of the Petitioners. The Special Verdict of the Jury found that Rainbow City did intentionally treat the Campbells differently from other similarly situated landowners who sought tentative approval of building plans; there was not a rational basis for the difference in the treatment of the Plaintiffs by Rainbow City; the Plaintiffs' exercise of their free speech rights made a difference in Rainbow City's decision to deny tentative approval of Plaintiff's building plans; and, Rainbow City would not have made the same decision on the Plaintiffs application even if the Plaintiffs had not exercised their first amendment rights. Damages awarded Petitioners with Lost Income or Profits of $903,357 and Emotional or Mental Anguish of $225,000.

The District Court's judgment, dated January 30, 2004, permanently enjoined Rainbow City from treating the Plaintiff James [sic] R. Campbell and Marilyn L. Campbell differently than other similarly situated landowners with respect to the processing and approval of any building plans hereafter submitted by the said Plaintiffs to Rainbow city. (App. C).

On February 21, 2004, the District Court denied the City's post-trial motions for judgment as a matter of law, or alternatively motion to alter, amend or vacate the judgment, or alternatively motion for new trial. (App. B).

On January 6, 2006, a panel of the United States Court of Appeals for the Eleventh Circuit reversed the opinion of the trial court and directed the trial court to enter judgment for the appellants. (App. A). The order of the United States Court of Appeals denying the Petitioners Petition for Reconsideration of the Decision or alternatively a Rehearing *En Banc* was issued on February 22, 2006. (App. D).

JURISDICTION

Plaintiffs brought their action under the Fourteenth Amendment to the United States Constitution, via 42 U.S.C. § 1983, claiming denial of equal protection and under the First Amendment to the United States Constitution for retaliation by exercising their First Amendment rights. The United States District Court had jurisdiction under 28 U.S.C. § 1331, and the 11th Circuit Court of Appeals had Jurisdiction under 28 U.S.C. § 1291.

The 11th Circuit Court of Appeals entered its judgment on January 6, 2006.

On May 15, 2006, the application for an extension of time within which to file a petition for a writ of certiorari in the entitled Application No. 05A1028 was presented to Justice Thomas, who on that date extended the time to and including July 22, 2006.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to . . . petition the Government for a redress of grievances."

2. The Fourteenth Amendment to the United States Constitution provides that: "No State shall . . . deprive any person of life, liberty or property, without due process of Law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1996 Joseph Campbell ran for the office of Mayor of Rainbow City (hereinafter called RBC or City('s)) and was defeated by the incumbent, Sue Glidewell. During his bid for office, Mr. Campbell was critical of Glidewell and her policies.

The RBC Zoning Board has an ordinance with a set of specific regulations governing building developments within RBC. The ordinance specified 10 apartment units per acre; the ordinance was loosely enforced or ignored by builders with no consequence. On May 5, 1997 the Campbells purchased approximately ten acres of land within RBC. The property was zoned for multi-family housing. Plaintiff Campbells wanted to build an apartment complex on the tract of land. The property was appraised at $506,000 at the time of purchase.

In January 1998 Mr. Campbell met with Mayor Glidewell to discuss the construction of an apartment complex on the

property. On February 20, 1998 Mr. Campbell came before the City's Planning Commission. He sought to develop 18 apartment units per acre on the land. The Planning Commission decided to table the matter for discussion.

On March 23 and 24, 1998, Mr. Campbell attended a City Council meeting and a Planning Commission meeting, respectively, to determine if he would be permitted to build 16 apartments units per acre on his land. Both the City Council and the Planning Commission tabled the matter for further discussion.

On April 28, 1998, Mr. Campbell again went before the Planning Commission. At this time, he proposed building just one building with 16 units on a portion of the property. Mr. Campbell believed and later testified at trial that if he impressed the planning commission with this building and development, they would allow him to build the additional apartments. He further believed and testified that the apartments proposed would be an asset to the community, ones of which both the Campbells and RBC could be proud. The Planning Commission, wary of Mr. Campbell's request, tabled any action until it could consult with the City's attorney. It should be noted that at this time neither the Mayor, City Council, or the Planning Commission had responded either verbally or in writing to any of the Campbell's proposals or discussions concerning this project. As to the City being wary of the Campbell's concession to build just one building as proposed, they were not so wary as to fight this project for eight years, all the way to this the Supreme Court.

After four months and no response in any form, the Campbells were finally given directions and a handout from

the RBC Building Department. They were directed to file for *tentative approval* for their project. The Campbells complied with all directions listed on the City's handout.

In May 1998 Mr. Campbell hired an attorney to help him with his requests. On May 11, 1998, Mr. Campbell attended a City Council meeting and left paperwork with the Council. In a letter addressed to Mayor Glidewell on the same date, Plaintiffs stated their reasons for seeking a variance from the limitations of ten units per acre in accordance with the prevailing RBC building ordinance. It was explained that economically the more units per acre the lower the cost per unit. This was imperative in order to compete with other developments that were given great flexibility in the building process. Another apartment complex, Hidden Creek Apartments, was referenced at trial and at the appeals level. This complex is located within one-fourth mile of the Campbells proposed project. In its opinion, the 11th Circuit Court of Appeals erroneously stated that the Hidden Creek complex was a "small, 16-unit development on a half-acre near plaintiffs tract of land." The records clearly indicate they are mistaken; the project has in fact, 22 units per acre, with 32 apartments on 1 ½ acres of land with 10 ordinance violations. This significantly alters the comparison between the two projects and should not be used for the purpose of stating that the projects were vastly dissimilar in scope and nature. It also indicates that the 11th Circuit either did not accurately receive the facts of this case or simply ignored them to make their point.

On June 8, 1998, the Campbells sent another letter to the Mayor and City Council indicating that the RBC Attorney had informed them that they had not complied with the requirements for tentative approval. The Campbell's letter

was an attempt to demonstrate compliance with the City's requirements. Again there was no response from the City.

On October 8, 1999, after an inquiry from the Campbell's attorney, the City Attorney stated that the Campbells had never satisfied the fifth requirement for tentative approval. With no response from the City as to what density would be allowed, a site plan could not be completed. In a letter, the City's attorney then directed the Campbells to the RBC Board of Adjustment to seek variances. On November 5, 1999, the Campbells filed an application with the Board of Adjustment in which they sought five variances. One of the variances sought was to be treated the same as the Hidden Creek complex with 22 apartments per acre. The Board of Adjustment, which met in May 2000, turned down all of plaintiffs' requests for variances. In 1999 the City changed its ordinance to allow 16 units per acre.

Eventually the plaintiffs sold half of the subject property. Another party developed apartments on this property under the name Meadow Oaks. This party received a permit and permission to build their apartments before the purchase was even complete and then built the units on an expired permit.

Plaintiffs, Joseph and Marilyn Campbell, brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Alabama against Defendant Rainbow City seeking damages allegedly resulting from the City Council and Planning Commission's denial of even tentative approval, the first step as directed by the City, for Plaintiffs' proposed building project. Plaintiffs' contention at trial was that the City violated their rights under the First Amendment's Freedom of Speech and the Fourteenth Amendment's Equal Protection Clause when it denied them

such tentative approval. Plaintiffs claimed at trial that all other developers that came before the Planning Commission received approval and aver that Plaintiffs were treated differently by the City because of Mr. Campbell's candidacy in a mayoral election in which he ran against the incumbent Mayor. This Mayor is also a member of the same Planning Commission that refused to give tentative approval to the Campbell's proposed project. The case went to trial in January 2004; the jury returned a unanimous verdict for the plaintiffs.

Defendant Rainbow City appealed the jury verdict, asserting as error the District Court's denial of Defendant's Rule 50 motion for judgment as a matter of law. The 11th Circuit Court of Appeals reversed the District Court ruling and directed the Court to enter judgment for Defendant.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit erred in its reversal for the following several and glaring reasons:

1. The 11th Circuit reversed on the basis of: "Plaintiffs failure as a matter of law to show that the City's final policymaker acted with an unconstitutional motive, and thus no reasonable jury could find that the City violated the Plaintiffs First Amendment rights." The fact remains that as a matter of law, a reasonable jury did find for the plaintiffs by stating that not only were their 1st Amendment rights violated but that also their Equal Protections rights under the 14th Amendment were violated. The jury was not unreasonable or unqualified in any way. Quite the opposite, they were accepted by the Federal Judge, the Plaintiff and the Defendant. The Eleventh Circuit also did not find fault

with the jury. This leaves the part that says *"as a matter of law."* In this area of the Rule 50 reversal, the Eleventh Circuit "cherry picks" or just addresses part of the trial and ignores case law and precedents that apply to this case that in its totality was understood by a reasonable jury.

The First Amendment guarantees freedom of expression and, in so doing, forbids government entities and agents from exercising the power of the government to retaliate against the exercise of the right to speech. *See Crawford-El v. Britton*, 523 U.S. 574, 592, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). For a First Amendment retaliation claim, Plaintiffs must demonstrate that they engaged in speech on a matter of public concern, and that the speech was a motivating factor in some adverse action taken against them. *See Mount Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2nd 471 (1977); and *Chesser v. Sparks*, 248 F.3d 1117 (11th Cir. 2001). In addition, the defendant may prevail by showing that it would have reached the same decision in the absence of the protected speech. *See Crawford-El*, 523 U.S. at 593 and *Mount Healthy*, 429 U.S. at 287.

The 11th Circuit also erred by not examining other courts' opinions concerning 1st Amendment violations. *See Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992) where a husband and wife, as in this case, alleged their development projects were denied because the Plaintiffs had been openly critical of the Puerto Rican government's environmental policies. The Court found that Plaintiffs had established a *prima facie* case of retaliation where they showed that they were outspoken critics of the government, that they were "qualified" for the permit, and that the permit was denied despite the fact that similar

requests for similar projects were routinely granted. The Court further noted that the most critical element of proof was the fact that other such projects routinely were granted. *Id.* Evidence presented at the Campbell trial clearly indicated that the City's Planning Commission routinely granted permits to builders in violation of the density requirements and other provisions of the zoning ordinance, and that the Commission had routinely permitted builders to begin construction without requiring that they submit stamped plans.

2. As a matter of Law, under the First Amendment, the Eleventh Circuit also erred by not recognizing the "rubber stamp theory" where the "final decision-maker" is shown, by evidence, to have acted as a rubber stamp for the decisions of another municipal official who was motivated by unconstitutional animus. Where the "final policymaker" *rubber stamps* the other's recommendation – especially where, as here, the final policymaker does that as a matter of routine course, and not just in this instance – then the requirements for municipal liability is met, even if the final policymaker did not know about the unlawful motivation of the official whose decision it is rubber stamping.

The Appeals Court also erred by not following its own rules about proper preservation and presentation where the City did not ask either the trial court or the Appeals court to reject or ignore the rubber stamp theory, but accepted that the theory was a legally valid one if the evidence would support it. A jury found evidence to support it.

The panel accepted for purposes of its opinion (Opinion pp. 11-12), the Mayor had animus against the Campbells that violated the First Amendment; a desire to retaliate against

them because Mr. Campbell had run against her. Because many of the impediments that the City placed in the Campbells way came through the Planning Board, the question of the relationship between the Mayor and the Planning Board was factually important. There was evidence – this must be taken as true given the jury's verdict – from a City councilman who had also been the City's Building Inspector, Mr. Jack Bowling. Mr. Bowling was, by virtue of those roles, well situated to know and to tell of the extent of the Mayor's influence over matters of building developments within the City. His testimony was striking, clear and unequivocal; the Planning Commission, as a matter of routine and custom and practice, did what the Mayor told it to do. Period. "She [the Mayor] is the final say." The Mayor "runs the Planning Board. Whatever she wants done gets done with the Planning Board." "The standard everyday practice is outside the ordinance if the Mayor wants it so." (Tr. 215-18, 226-28).

Multiple times the Campbells appeared before the Planning Board (Commission) and the City Council requesting initial (tentative) approval of their project only to have their requests "tabled" pending some further action, discussion or answer from City officials then finding that the answer never came.

On page seven of the 11th Circuit Court of Appeals opinion the Court states that "the Etowah Steelworkers and the Wallace Medical Center are commercial developments" and should not have been used as comparators. This was never an issue. They were not used as *comparators*, but were used expressly to show how the Mayor interfered with the day-to-day operation of the Building Department. Even the City's own Building Department employee made notes found

in the files and examined at trial that explained and demonstrated the Mayor's control over the building department.

> 7/24/97: Renick Adams called and said he had talked with the lady down the hall. She told him to keep his mouth shut and continue with Etowah Steelworkers as is. He said I probably would want to do the same thing. Kathy Hill, 3:39 p.m.
>
> 7/25/97: I talked with Mayor Glidewell about Etowah Steelworkers. She said she told Renick Adams to go ahead and continue with his project. She said we had overlooked others, so we would overlook his. Kathy Hill

It is interesting to note that these notes found in the files and photocopied while being examined by the Plaintiffs expert witness, were missing from the files several days later. Ms. Hill also stated that she made notes for "all the building files", but these were the only notes ever found concerning any of the projects.

The Wallace Medical Facility demonstrates how the Planning Commission could ignore the ordinances without the City Attorney directing them to the Board of Adjustment when it so chose. The panel should not have reversed the District Court based on a contention that was never even presented to the 11th Circuit. (*See Access Now, Inc. v. Southwest Airlines*, 385 F.3d 1324 (11th Cir. 2004)) (*this Court will not reverse based either on an argument not made to it, or on an argument not made to the District Court*). The panel erred in failing to follow this Court's law on preservation and presentations of contentions.

Other Courts have agreed with the legal viability of such a theory of Municipal liability. *See Johnson v. State of Louisiana*, 369 F.3d 826, 832 (5th Cir. 2004) (First Amendment 1983 Case) ("*[I]f the final decision-maker merely "rubber stamps" an evaluation made by a subordinate, then the* subordinate's improper motive may be imputed to the decision-maker"); *see also Beatty v. Madison County School Dist.*, 254 F.3d 595, 604 n.14 (5th Cir. 2001) (*holding that municipal liability may attach not only when the final policymaker is aware of a subordinate's unlawful motivation and ratifies it, but also where the subordinate "had sufficient influence or leverage over the ultimate decision maker" such that the ultimate decision was a mere rubber stamp).*

The City did not deny in the trial court or in the 11th Circuit that "rubber stamp/sufficient influence" is a viable theory of liability – and arguments that are not made are not preserved for grounds of reversal. Secondly, there is no basis in the language or law of Section 1983 to draw a distinction between multi-member bodies and individuals in this regard. Finally, this case presents no issue of problematic policy as to how much influence over a multi-member body's votes will be enough to satisfy the "rubber stamp" theory of liability. The evidence in this case shows that the Mayor's control over the Planning Commission was complete and was routinely exercised. *Compare Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002) *on which there was merely some "influence" though apparently no evidence of real "rubber stamping."*

The evidence in the present case was plainly sufficient to show municipal liability based on this "rubber stamp/ sufficient influence" theory. There was evidence, which if

believed – and it must be believed at this juncture – showed that the Planning Commission as a matter of routine did what the Mayor told it to do. What the Mayor wanted the Planning Commission to do, the Planning Commission did – period. Thus the panel erred in overturning the verdict on the First Amendment Claim, and in so doing, the panel made serious errors of law that put the 11th Circuit into conflict with other courts as well as with itself.

3. On Page 3 the 11th Circuit found that the "Plaintiffs have not offered any evidence to support an equal protection claim of similarly-situated individuals who were treated differently. With this statement the Court erroneously explains that *the Plaintiffs own property is not similarly situated to itself!* On page 17 and 18 the Court explains, "plaintiffs have not provided evidence showing a development to be similarly situated, it must have sought tentative approval." The Court erred in as much as the Plaintiffs were not in charge. After the April 28, 1998 proposal in which the City was too wary to respond to the Campbell's 16-unit request, the Campbells were directed to file for "tentative approval" by the RBC Building Department; other builder/developers were not so directed. This difference in treatment was part of the Plaintiffs' evidence at trial. It should not now be used by the Court to say the Plaintiffs were not similarly situated to comparators that were treated better. A reasonable jury understood this and so ruled.

When the 11th Circuit found that the Plaintiffs did not present evidence of similarly situated property, the 11th Circuit erred by ignoring the evidence presented at trial with respect to the St. Christopher Apartments. On page 18 of their opinion it states "plaintiff would need to provide a record of what

the developer had brought before the planning commission when it was granted tentative approval." The developers of St. Christopher never appeared before the Planning Commission (see Planning Commission minutes) or followed any of the steps in the approval process. They were granted *final* approval of their project after a telephone poll as evidenced in a letter written by the Mayor and presented as evidence at trial. The Campbells, therefore, can not be expected to produce paperwork that the City did not require of this builder and which never existed. This builder was treated much more favorably than the Campbells. This does not make the Plaintiff dissimilar as reasoned erroneously by the 11th Circuit.

The purpose of the equal protection clause of the Fourteenth Amendment is to safeguard every person against intentional discrimination by a governmental body, whether the discrimination is the product of the express language of a statute or by its "improper execution through duly constituted agents." *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ws. 2d 1060 (2000). *The equal protection guarantee of the Fourteenth Amendment is violated where a facially-neutral statute is applied differently to similarly situated plaintiffs and the unequal application is done purposefully to discriminate. See Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996), citing *E & T Realty v. Strickland*, 830 F.2d 1107, 1109-10 (11th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

The Plaintiffs did not seek preferential or different treatment; they were simply treated differently. All of the other builders in RBC were different in some way: *All* builders who sought approval were approved, *none* of the builders were sent to the Board of Adjustment, *not all* were

required to seek tentative approval, *all* received responses from the Planning Commission and/or the Mayor, *none* of the builders followed the ordinances. Yes, the Campbells were treated differently, but to use this unjust treatment to now say the Campbells were not *similarly situated* is to use the term "the 11th Circuit erred" in a light most favorable to the 11th Circuit.

An action does not lie where the different treatment occurs due to ineptitude or even arbitrariness, but where there is a discriminatory intent such as a "vindictive action," or one motivated by "ill will" or "illegitimate animus". *Olech*, 528 U.S. at 566. The trial record clearly illustrates that the Campbells were singled out and required to comply with rules that were not enforced against other developers before or after the Campbells' proposal was submitted. The Plaintiffs presented evidence that demonstrated that the Mayor exercised power over planning decisions.

4. The 11th Circuit erred again in not recognizing the Plaintiffs' expert witness's testimony. The expert witness testified at trial as to the difference in treatment of the Campbells and about the similarly situated developments with no stated objective or reason for this difference in treatment. His testimony was extensive and included an Expert Report that was detailed and thorough and clearly supported both the 1st and 14th Amendment violation claims made by the Plaintiffs. The expert was neither challenged nor discredited by the defendant, the District Court or by the 11th Circuit on appeal. The Appeals Court erred in stating that the Plaintiffs offered not a "scintilla of evidence" when it was clearly provided by this expert witness, as well as by the testimony of the Plaintiffs, two City Councilmen and others. The Defendant also did not offer its own or opposing

expert. While the defendant is not, of course, required to present their own expert, they cannot later question the testimony or validity of the only person so designated as an expert. The expert's testimony concerning the distinctions made against the Plaintiffs by RBC that led to this legal action must, therefore, be accepted as truth and should have great weight with the Court. The 11th Circuit erred in overlooking this important part of the record established at trial and a part of the record believed by the jury as indicated by the verdict.

CONCLUSION

There is a view in law as to how a reasonable and prudent man would see a situation. In looking back, one can see and reason much more clearly, such as the Planning Commission not responding to the Campbells in any letter, ruling or in any official way during this last eight-year period. One can believe an individual would receive a yes, a no, or at least suggestions on a project proposed by one of its citizens. The April 28, 1998 proposal from the Campbells speaks volumes. The Campbells did not seek any variances or tentative approval. Variances were not needed as their proposal was well within any ordinance requirements. Still, the minutes of that meeting read, "Tabled until City attorney can give an opinion." That opinion never came. Instead, the City attorney, the Alabama Municipal Insurance Corporation and the City of Rainbow City have opposed a reasonable development while eagerly accepting new owners on the same property. The Campbells did not seek other variances or anything different, they sought only to build apartments. The City's own Building Department and the City's attorney sent the Campbells on this dead-end, impossible to comply with, goosechase that left them with no recourse other than legal action. One must look for reasons beyond the legal for their actions.

Even the oral arguments required by the 11th Circuit in this case were not about those items we were told to brief on, but instead were an attack on the character, intelligence, and motivation of the plaintiffs and a blatant disrespect for the judgment and opinions of law concluded by Judge Clemon. This may give some indication how the 11th Circuit could come to such an erroneous conclusion and overturn the trial verdict.

It should also be noted that the 11th Circuit twice sent the parties to mediation in an attempt to settle this case; the Campbells were willing to negotiate in good faith. If, however, the 11th Circuit felt that there was not enough evidence to present this case to a jury or that the evidence was so overwhelmingly in favor of the defendant City so as to warrant overturning a jury verdict, one must wonder why they sent the parties to mediation two times instead of simply reversing the original verdict.

This case rises to a high priority level because of the violations of the First Amendment Right of Free Speech and the 14th Amendment Equal Protection Clause's of the Constitution, and also because of the invalid precedents and case law by which the Chief Justice of the Northern District, a Federal Judge with more than 30-years experience, and a jury verdict were overturned.

This case is also important because of the principles of wide public or governmental interest. When a governmental body abuses its offices or an elected official uses his or her office for personal gain or for personal animus, citizens must have the right and the obligation to attempt to right that wrong. Local, state and federal law must be upheld by those who serve the public; and the courts must require them to

uphold those laws. In this case, the 11th Circuit ignored the facts of the case and ignored and/or misapplied the law. Citizens must have the right to appeal and overturn those decisions to protect the rights of all citizens.

We respectfully request that you either grant the petition or consider a *Summary Reversal* of the 11th Circuit opinion as it is so erroneous that a briefing and argument may be a waste of time.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JANUARY 6, 2006

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-11409

JOSEPH R. CAMPBELL, MARILYN CAMPBELL,

Plaintiffs-Appellees,

v.

RAINBOW CITY, ALABAMA,

Defendant-Appellant.

Jan. 6, 2006.

Before CARNES and PRYOR, Circuit Judges, and FORRESTER*, District Judge.

FORRESTER, District Judge:

Plaintiffs, Joseph and Marilyn Campbell, brought this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Alabama against Defendant Rainbow City (hereinafter "Defendant" or "the City"), its mayor and its Board of Adjustment, seeking

* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

damages allegedly resulting from the City Council and Planning Commission's denial of tentative approval for Plaintiffs' proposed building project.[1] Plaintiffs contend that the City violated their rights under the First Amendment and the Fourteenth Amendment's Equal Protection Clause when it denied them such tentative approval. Plaintiffs claim that all other developers that came before the Planning Commission had received approval and aver that Plaintiffs were treated differently by the City because of Mr. Campbell's candidacy in a prior mayoral election, in which he ran against the incumbent mayor, a member of the Planning Commission that refused to give tentative approval. The case went to trial, and the jury returned a verdict for Plaintiffs.

Defendant Rainbow City has appealed, asserting as error the district court's denial of Defendant's Rule 50 motion for judgment as a matter of law.[2] We agree for two reasons. Plaintiffs failed as a matter of law to show that the City's final policymaker acted with an unconstitutional motive, and thus no reasonable jury could find that the City violated the Plaintiffs' First Amendment rights. Moreover, Plaintiffs have not offered any evidence to support an equal protection claim of similarly-situated individuals who were treated differently. Thus, the district court should have granted the City's Rule

1. On March 9, 2001, Plaintiffs, represented by new counsel, filed a second amended complaint in which only the municipality of Rainbow City was named as a Defendant. Thereafter, the mayor and the Board of Adjustment were no longer parties to the litigation.

2. Defendant also appeals the district court's ruling on several other grounds. Because we conclude that the district court should have granted the City's Rule 50 motion, we need not address Defendant's other arguments.

50 motion. For these reasons, the order of the district court is reversed, and it is directed to enter judgment for Defendant.

I. Background

In 1996, Mr. Campbell ran for the office of Mayor of Rainbow City and was defeated by the incumbent, Mayor Sue Glidewell. During his bid for office, Mr. Campbell was critical of Glidewell and her policies.

All building projects in Rainbow City must gain approval of the City Council and the Planning Commission. As part of her office, Mayor Glidewell is a voting member of both the City Council and the Planning Commission and appoints six of the other nine members to the Planning Commission. Prior to final approval of a project, the Planning Commission can grant tentative approval if the applicant meets certain requirements. Tentative approval permits the developer to start preparing the site for construction by allowing cleaning and clearing of the land and some minor grading.[3]

The Rainbow City Zoning Ordinance has a set of specific regulations governing developments within Rainbow City. One such regulation affecting multifamily housing developments relates to density. Prior to 1999, the Ordinance allowed a density of ten units per acre. The Ordinance was amended in 1999 to allow a density of sixteen units per acre.

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3. The city building inspector developed the concept of tentative approval and its requirements. The City grants or denies tentative approval if it is sought by a developer, but the City has never officially required that it be obtained.

Appendix A

On May 5, 1997, the Campbells bought approximately ten acres of land within Rainbow City.[4] The property was zoned for multifamily housing. Plaintiffs wanted to build a large apartment complex on the tract of land. Originally, the Campbells intended to build 180 units on the property. In order to develop the property in this manner, Plaintiffs would need to obtain a variance because the pre-1999 Ordinance would permit only 100 units on a ten-acre tract of land. In January 1998, Mr. Campbell met with Mayor Glidewell to discuss the construction of an apartment complex on the property. Later, on February 20, when Mr. Campbell came before the City's Planning Commission, he sought to develop 162 apartments on the land. He brought a vicinity map, which highlighted the property, to the meeting. The Planning Commission decided to table the matter for discussion.

On March 23 and 24, 1998, Mr. Campbell attended a City Council meeting and a Planning Commission meeting to determine if he would be permitted to build 162 apartments on the land. Both the Council and the Planning Commission tabled the matter for further discussion.

On April 28, 1998, Mr. Campbell again went before the Planning Commission. This time he stated that he was seeking to build one building with 16 units on part of the property. Mr. Campbell believed that if he impressed the Planning Commission with this development, it would allow

4. Although the parties repeatedly refer to Plaintiffs' property as "ten acres," after the original purchase of the land, the Campbells sold 1.17 acres. Thus, the acreage is less than nine acres, rendering the density figures given by the parties too low. Nevertheless, because our analysis does not change whether the acreage is nine or ten, we will continue to refer to the land as ten acres.

him to build the other apartments. The Planning Commission, wary of Mr. Campbell's request, tabled any action until it could consult with the City's attorney.

In May 1998, Mr. Campbell hired an attorney to help him with his requests. On May 11, 1998, Mr. Campbell attended a City Council meeting and left paperwork with the Council. In a letter addressed to the Mayor on the same date, Plaintiffs stated their reasons for seeking a variance from the limitation of ten units per acre.

On June 8, 1998, the Campbells sent another letter to the Mayor and the City Council. The Campbells indicated in the letter that the City lawyer had informed them that they had not complied with the requirements of tentative approval and the letter was an attempt to demonstrate compliance.[5] The Campbells stated that they were seeking tentative approval for twenty-two apartments per acre on their ten-acre tract. Attached to the letter was a sketch drawn in pencil showing the locations of the proposed buildings.

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5. There is some dispute about whether there were four or five requirements for tentative approval. Plaintiffs submitted one document from the Rainbow City Planning Commission stating the requirements for tentative approval were: (1) name, address, and phone number of the property owner, (2) the address of the property under consideration, (3) a sketch of the property with building locations, and (4) zoning and land use information. The document attached to the Plaintiffs' June 8 letter, however, contained another additional requirement: (5) approval subject to plans and specifications and after review by building, fire, and engineering departments. This dispute is not relevant to our analysis.

Appendix A

The next correspondence between the parties appears to have taken place more than one year later. After an inquiry from the Campbells' attorney, on October 8, 1999, the City's attorney stated that the Campbells had never satisfied the fifth requirement for tentative approval.

Under the structure set up by the City, parties dissatisfied with the Planning Commission's response may appeal to the Board of Adjustment. On November 5, 1999, the Campbells filed an application with the Board of Adjustment in which they sought a number of variances. Plaintiffs sought a variance with regard to apartment density, so as to allow them to build twenty-one units per acre as opposed to sixteen, the maximum that the Ordinance would have allowed at that time. They also sought a variance from the setback requirement for buildings, which required a setback of fifteen feet from parking areas. They sought a variance from the requirement for the mandatory spacing between buildings. Finally, Plaintiffs asked for a variance from the mandatory front and back yard space requirements. The Board of Adjustment, which met in May 2000, turned down all of Plaintiffs' requests for variances. Eventually, Plaintiffs sold half of the property. Another party developed that portion of the property under the name Meadow Oaks.

Plaintiffs offer the following developments as comparators: the Etowah Steelworkers Credit Union, the Wallace Medical Center, Regency Point, St. Christopher Apartments, the Hidden Creek Apartments, Meadow Oaks, Terry Echols' apartments on Brown Avenue, and Terry Echols' apartments on Sixth Street.

Appendix A

The Etowah Steelworkers Credit Union and the Wallace Medical Center are commercial developments. Regency Point was built in 2000 as a Planned Unit Development for a mixed-use retirement community. There is no evidence in the record to show that Regency Point sought or obtained tentative approval from the Planning Commission to develop the property. The area was rezoned without the developer furnishing the City with a zoning request or a concept plan. According to Plaintiffs' expert, Mr. Stinson, Regency Point does not have the mix of commercial and residential housing required by the Ordinances relating to a Planned Unit Development.

The St. Christopher apartment complex was built partially on land zoned for R-1 property, a designation which does not allow the building of apartments. Mr. Stinson could find no record of plans having been submitted to the City's building department.

The Hidden Creek Apartment complex is a small, sixteen-unit development situated on a half-acre near Plaintiffs' tract of land. There is no evidence in the record to show that the developers of the Hidden Creek Apartments sought or received tentative approval for the development prior to receiving final approval. According to Mr. Stinson, the Hidden Creek Apartments do not comply with the City Ordinances governing density, parking, and recreational areas.

The Meadow Oaks development, a fifty-six-unit multifamily apartment complex, built on land originally owned by Plaintiffs, was granted tentative approval by the

Planning Commission after its developers submitted a site plan. The development as built does not have the proper buffer zone between the development and an adjacent single family residence.

Finally, Plaintiffs claim their project to be similarly situated to the two sets of apartments built by Terry Echols: an eight-unit complex on Brown Avenue and a ten-unit complex on Sixth Street, both of which do not comport with the City Ordinance in numerous ways. Both Echols' developments sought and received tentative approval from the Planning Commission. Each time Mr. Echols came before the Commission, he brought site plans outlining the proposed locations of the buildings. On a few occasions he was accompanied by both his architect and his engineer who would answer questions posed by the Planning Commission relating to the proposed development.

Mr. Echols appeared before that Planning Commission six or seven times prior to receiving tentative approval for his development on Sixth Street. For his Brown Street development, Mr. Echols attended at least two meetings prior to getting tentative approval. Each time that he was not granted tentative approval, the Planning Commission would table the matter for further discussion, and he was expected to return to seek approval at the next meeting.

At trial, Plaintiffs supported their argument that they were treated differently and retaliated against by the City with the testimony of the City's former Building Inspector, Jack Bowlings. Although Mr. Bowlings was not present at trial because he was deceased, he had given sworn testimony

at three pretrial depositions. Moreover, prior to the third deposition, he had submitted a sworn affidavit to the parties. Plaintiffs contend that the statements in the depositions and the affidavit prove that they were treated unjustly by the City. Defendant argues that the testimony of Mr. Bowlings is inadmissable, a position with which we find some sympathy. However, because we decide the case on other grounds, we need not further address Mr. Bowlings' testimony. Similarly, we do not address Defendant's appealing argument that the expert testimony relied on to support the award of damages is inadmissible.

II. Discussion

After the conclusion of Plaintiffs' case and at the end of trial, the City made Rule 50 motions for judgment as a matter of law. The trial court denied these motions. Defendant appeals this denial.

We review a *Rule 50* motion for judgment as a matter of law *de novo*, applying the same standards used by the district court. *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir.2000) (per curiam). We consider "whether sufficient conflict exists in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that that party is entitled to succeed in his or her own position as a matter of law." *Id.* "Although we look at the evidence in the light most favorable to the non-moving party, the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Id.* Because the jury found for Plaintiffs on both the First Amendment claim and the equal protection

claim, Defendant must show that the trial court erred in sending both claims to the jury.

A. Section 1983 Claims

A "local government 'may only be held liable under *Section 1983* if action pursuant to official . . . policy of some nature caused a constitutional tort.' " *Matthews v. Columbia County*, 294 F.3d 1294, 1297 (11th Cir.2002) (per curiam) (quoting *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir.1994)). Further, only municipal officers or groups who have final policymaking authority may subject the municipality to § 1983 liability. *Id.*

B. First Amendment

We assume, for the purposes of appeal, that Plaintiffs' speech is protected by the First Amendment. We also assume that Plaintiffs produced evidence from which a reasonable jury could have found that Mayor Glidewell sought to punish Plaintiffs in retaliation for their protected speech. In order to find that the City is liable for such an alleged tort, however, we must find that the Planning Commission, the final policy maker, acted with the improper motive. *Matthews*, 294 F.3d at 1297. An improper motive of one of the members of a nine-member Planning Commission is not imputed to the rest of the Commission. *Id.* (unconstitutional motive of one member of a three-member majority is insufficient to impute an unconstitutional motive to a commission); *Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir.2001) (summary judgment for municipality appropriate where plaintiff showed evidence of discriminatory motive held by one member of a three-person majority).

Appendix A

In *Matthews*, the plaintiff alleged that her job as the County's Director of Administrative Services was eliminated in retaliation for her statements concerning a company with which the County was attempting to contract. Three of five county commissioners voted to eliminate the position. In a special verdict, a jury determined that one of the commissioners was motivated to eliminate the position by the plaintiff's protected speech and that the two other commissioners were "influenced" by that commissioner. We held, however, that the plaintiff's evidence did not support a finding of unconstitutional motive on behalf of the County Commission on the basis either of a theory of delegation or ratification. *Matthews*, 294 F.3d at 1297. We found that a delegation theory applies only where a group with final policymaking authority delegates its authority to another person or entity, and that person or entity is not subject to any review by the original policymaker. *Id.* (citing *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir.1997)). We also found that in order for a municipality to be liable under a ratification theory, the final policymaker must ratify not only the decision of its member with an unconstitutional motive, but also the unconstitutional basis itself. *Id.* (citing *Gattis v. Brice*, 136 F.3d 724, 727 (11th Cir.1998)).

Here, as in *Matthews*, the evidence fails to show that the Planning Commission, the policymaker for the City, acted with an unconstitutional motive in denying Plaintiffs "tentative approval" for their building project. The only evidence that Plaintiffs offered into evidence were the opinions of Mr. Bowlings that Mayor Glidewell influenced and controlled the Planning Commission; there is not a scintilla of evidence that the Commission knew of and ratified

an unconstitutional motive in its decision to repeatedly table Plaintiffs' request for tentative approval of their project. Without any evidence showing that a majority of the members of the final policymaker, the Planning Commission, acted with an unconstitutional motive, the trial judge erred in denying Defendant's Rule 50 motion with respect to the Plaintiffs' First Amendment Claim.

C. Equal Protection

As a preliminary consideration, federal courts should be disinclined to "sit as a zoning board of review," and as a "general rule," zoning decisions "will not usually be found by a federal court to implicate constitutional guarantees." *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir.2003) (per curiam). Nevertheless, the Equal Protection Clause requires government entities to treat similarly situated people alike. Equal protection claims are not limited to individuals discriminated against based on their membership in a vulnerable class. Rather, we have recognized any individual's right to be free from intentional discrimination at the hands of government officials. *See, e.g., E&T Realty v. Strickland*, 830 F.2d 1107, 1112 (11th Cir.1987). To prevail on this traditional type of equal protection claim, basically a selective enforcement claim, that the City's Ordinance was applied to them, and not other developments, Plaintiffs must show (1) that they were treated differently from other similarly situated individuals, and (2) that Defendant unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiffs. *See Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir.1996).

Plaintiffs' equal protection claim and the court's jury instruction thereon seem to mirror a newer trend in equal protection law, "a class of one claim" without a necessary showing of ill will or discriminatory purpose. The Supreme Court has recognized the Equal Protection Clause is implicated in "class of one" claims "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam).[6]

The analysis of Plaintiffs' equal protection claim requires a finding that there were developments which were similarly situated to the Campbells' proposed development, because "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." *E&T Realty*, 830 F.2d at 1109. A showing that two projects were similarly situated requires some specificity. *Strickland v. Alderman*, 74 F.3d at 264-65; *Racine Charter One, Inc. v. Racine Unified School Dist.*, 424 F.3d 677, 680 (7th Cir.2005) (finding that "[t]o be considered 'similarly situated,' comparators must be *prima facie* identical in all relevant respects") (internal citations and quotations omitted). In the zoning context, projects which seek different types of variances are not

6. Some circuits have read *Olech* to still require ill will on the part of the defendant. *See, e.g. Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 454 (7th Cir.2002). Other circuits following *Olech* have found that a plaintiff can also bring a successful equal protection claim merely by "negativing every conceivable basis which might support" the government action. *Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir.2005) (quotation and citation omitted). Without deciding whether illegal animus is required to show a equal protection violation, we find that the Campbells have not satisfied either test.

similarly situated. *See Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455-56 (7th Cir.2002).

Here, the district court in its jury instructions correctly specified the first step in determining if Plaintiffs' evidence supported an equal protection violation when it required the jury to find that the City treated Plaintiffs "differently from similarly situated landowners who sought tentative approval of apartment building plans." However, the district court erred in denying Defendant's Rule 50 motion because Plaintiffs failed to provide the jury with sufficient evidence from which it reasonably could have determined that any of the comparators offered by Plaintiffs were similarly situated to the Plaintiffs' development.

Applying the logic in *Racine*, in order for any development to be similarly situated to Plaintiffs' proposed project, it must be *prima facie* identical in all relevant respects. In any type of zoning situation, the use of the proposed development is quite relevant. The district court correctly recognized the importance of use in its equal protection charge to the jury which directed that only developers who sought approval of *apartment* building plans could be considered similarly situated. Because the Campbells sought to build a large residential complex, it would be in error for the court to consider commercial developments that sought tentative approval to be considered similarly situated to the Campbells' project. This obvious conclusion eliminates both the Etowah Steelworkers Credit Union and the Wallace Medical Center.

Next, because Plaintiffs are asserting that their damages were the result of the Planning Commission's denial of tentative approval for their project, for a project to be *prima facie* identical to Plaintiffs' development in all relevant respects, Plaintiffs must have shown that the other development sought and received tentative approval of its site from the City. Without a showing that a development sought and received tentative approval, a jury could not conclude that the development was similarly situated to Plaintiffs' development, nor could a jury conclude that the parties were treated differently. With regard to three of the developments that the Plaintiffs contend were similarly situated, Plaintiffs did not provide sufficient evidence showing that the developments sought and obtained tentative approval.

Plaintiffs went to great lengths to show that the area on which the Regency Park development was to be built had been rezoned without the proper documentation.[7] However, Plaintiffs did not show that the Regency Park development ever sought and was granted tentative approval. As stated above, for a development to be similarly situated, it must have sought tentative approval. Because the two projects sought different action from the Planning Commission, we cannot find that the developments were similarly situated. We find such evidence also lacking with respect to the St. Christopher Apartments.

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7. The Planning Commission rezoned the land on which the Regency Park development was built as a Planned Unit Development without requiring application or concept plan. Furthermore, Plaintiffs point out that the intent of a Planned Unit Development is a mixed-use development and that the Regency Point development has only residential housing.

Moreover, for a reasonable jury to find the development to be similarly situated to Plaintiffs' development, Plaintiffs would need to provide a record of what the developer had brought before the Planning Commission when it was granted tentative approval. Without such information, neither a jury nor the court would be able to determine whether the Planning Commission had a rational reason for the different treatment. Because Plaintiffs provided no such information, no reasonable jury could find the St. Christopher Apartments to be similarly situated to Plaintiffs' development so as to warrant a finding of an equal protection violation.

Plaintiffs point to the Hidden Creek development as a similarly situated development that received treatment different from Plaintiffs' proposed development. Plaintiffs contend that this treatment was without a rational basis. While Plaintiffs have provided abundant evidence regarding the various violations of zoning ordinances by the Hidden Creek development, again, as in the case of the St. Christopher Apartments, Plaintiffs have not provided evidence showing that the developer of the Hidden Creek development sought and received *tentative approval* for the project. And even assuming that the Hidden Creek developer did seek tentative approval, Plaintiffs did not submit evidence to show what documentation the developer brought before the Planning Commission when it was seeking tentative approval. As stated above, such evidence is mandatory for a showing that the development was similarly situated to the Campbells' proposed development for equal protection purposes.[8]

8. Moreover, the sixteen-unit Hidden Creek development can hardly be considered similarly situated to the Plaintiffs' 144 -180 unit project. The impact on a community of a sixteen-unit apartment

(Cont'd)

Appendix A

Unlike Regency Point, the St. Christopher Apartments, and Hidden Creek, Plaintiffs have shown that some of the developments which Plaintiffs contend were similarly situated, sought and received tentative approval. Nevertheless, these developments do not justify sending the Plaintiffs' equal protection claim to the jury.

Plaintiffs contend that Meadow Oaks was similarly situated to their proposed development. They state that the City granted Meadow Oaks tentative approval despite the development needing a variance from a buffer zone requirement. However, the two developments cannot be considered similarly situated. While the land and the multifamily housing proposed use of these two developments were the same, Meadow Oaks did not require the same, or as many, variances as were sought with respect to Plaintiffs' proposed project.[9] The only alleged violation made in the Meadow Oaks development was a violation of a buffer zone requirement. As stated above, developments seeking different variances cannot be considered similarly situated. Moreover, prior to getting approval to develop

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(Cont'd)

complex that violates a zoning requirement is quite different from a 144-180 unit apartment complex. It is rational that a zoning board would be less likely to grant a variance to a development that would violate a zoning ordinance like the density requirement to a greater degree.

9. As noted above, Plaintiffs sought a variance with regard to apartment density so as to allow them to build twenty-one units per acre as opposed to sixteen. They sought variances from the setback requirement for buildings, from the requirement for the mandatory spacing between buildings, and from the mandatory front and back yard space requirements.

the property, the developers of the Meadow Oaks development submitted a completed site map for 13.02 units per acre which met density requirements. Thus, the two developments were not similarly situated, and there were material differences which could provide rational reasons for the different treatment of the two developments.

The Campbells also point to Terry Echols' Apartments on Brown and Sixth Street as developments that were similarly situated to their development and that were treated differently with no rational basis. There is evidence that the developer of both of those apartment complexes came before the Planning Commission and was granted tentative approval. Campbell contends that the developments were constructed in violation of the City's density requirement. The record, however, is silent on this point.[10] Further, unlike the Campbells, Mr. Echols stated that every time he appeared before the Planning Commission, he brought along plans for the proposed development. Sometimes he brought along an engineer and an architect to answer questions with respect to zoning requirements.

The City has always maintained that the Campbells did not comply with the requirements for tentative approval. One of the requirements for parties seeking tentative approval (under either the four-requirement or five-requirement approach) is a sketch of the property with building locations. The City contends that Plaintiffs did not provide an adequate

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10. Plaintiffs cite to page 456 of the record. Neither that page nor the surrounding pages mention the density of these units, and we are unaware of any other information in the record that supports this contention.

sketch in all of their meetings with the Planning Commission and indicated that the sketch brought by Plaintiffs was drawn in pencil which would have allowed any of the proposed building locations to be changed easily.

There is no doubt that the developer of Echols' projects provided sketches-at every meeting the developers produced site plans and came with an architect and an engineer to explain the plans to the Commission. Thus, even if the two developments were considered similarly situated in that they both sought tentative approval, there is no evidence that the Echols projects violated density requirements, and there was a rational basis for the different treatment that the two developments received. There is evidence that the two developments were not similarly situated in that Terry Echols' apartments on Brown and Sixth Streets are smaller than Plaintiffs' much grander design, comprising only ten and eight units, respectively, and the nature of the presentations Echols made would inspire more confidence than the Campbells' rather nonchalant approach.

Further, stating that Mr. Echols and the Campbells were treated differently is not entirely accurate. While the developer of the Echols developments was eventually granted tentative approval and the Campbells were not, the two parties' treatment by the Planning Commission was quite similar. Mr. Echols testified that for his development on Sixth Street he had to attend "six or seven" Planning Commission meetings prior to getting approval. In regard to his Brown Street development, Mr. Echols stated that he thought he attended more than two Planning Commission meetings. At those meetings in which he did not get approval, Mr. Echols

was not denied tentative approval; rather, the board did not take action and tabled the matter for more discussion. Mr. Echols was required to come back to subsequent meetings and eventually the issues were resolved. This treatment of Mr. Echols is quite similar to the treatment that Plaintiffs received. Thus, the evidence presented leads us to believe that the Campbells were treated similarly to another development that had come before the Planning Commission. Because Plaintiffs have not given any evidence of Defendant's different treatment of a development that was similarly situated to their proposed development, they have not met their evidentiary burden in bringing a successful equal protection claim. Thus, the district court should have found that no reasonable jury could find for the Plaintiffs on this claim and should have granted Defendant's Rule 50 motion for judgment as a matter of law.

III. Conclusion

Having found that Plaintiffs did not proffer sufficient evidence for a reasonable jury to find that the final policymaker acted with a discriminatory purpose against Plaintiffs in violation of their First Amendment rights, and having found that Plaintiffs did not proffer sufficient evidence for a jury to find that Plaintiffs were treated differently than similarly situated individuals in violation of the Equal Protection Clause, we find that the trial court erred in denying Defendant's Rule 50 motion for judgment as a matter of law. Thus, the opinion of the trial court is REVERSED, and the trial court is directed to enter judgment for the appellants.

APPENDIX B — MOTION FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION FILED FEBRUARY 9, 2004, DENIED FEBRUARY 21, 2004 AND ENTERED FEBRUARY 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

CASE NO.: CV 00-C-2080-M

JOSEPH R. CAMPBELL, et al.

PLAINTIFFS,

VS.

RAINBOW CITY, ALABAMA, et al.,

DEFENDANTS.

MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY MOTION TO ALTER, AMEND OR VACATE THE JUDGMENT, OR ALTERNATIVELY MOTION FOR NEW TRIAL

* * * *

DENIED

2/21/04

s/ [illegible]
Judge

APPENDIX C — PERMANENT INJUNCTION AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED AND FILED JANUARY 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Civil Action Number 00-C-2080-M

JAMES R. CAMPBELL and MARILYN L. CAMPBELL,

Plaintiffs,

vs.

RAINBOW CITY, ALABAMA,

Defendant.

PERMANENT INJUNCTION and FINAL JUDGMENT

Based on the Special Verdict of the Jury, it is hereby DECLARED that the Defendant RAINBOW CITY, ALABAMA, violated the Equal Protection and First Amendment constitutional rights of the Plaintiffs JAMES R. CAMPBELL and MARILYN L. CAMPBELL by denying them tentative approval of their building plans.

Accordingly, the Defendant RAINBOW CITY, ALABAMA, its Mayor, boards (including without limitation its Planning Commission), agencies, managers, supervisors,

agents, attorneys, employees, and those in active concert or participation with them who receive actual notice of this Order are hereby PERMANENTLY ENJOINED from treating the Plaintiffs JAMES R. CAMPBELL and MARILYN L. CAMPBELL differently than other similarly situated landowners with respect to the processing and approval of any building plans hereafter submitted by the said Plaintiffs to Rainbow City.

FINAL JUDGMENT is hereby ENTERED against Defendant RAINBOW CITY and in favor of the Plaintiffs JAMES R. CAMPBELL and MARILYN L. CAMPBELL in the amount of One Million One Hundred Twenty-eight Thousand Three Hundred and Fifty-seven Dollars ($1,128,357.00).

Plaintiffs shall have and recover of the Defendant a reasonable attorney's fee, to be set by the Court in the absence of agreement by the parties. Within ten (10) days of the date of this Order, Plaintiffs' counsel shall submit to Defendant's counsel a statement of the total fee requested, requested hourly rate, hours expenses, description of services provided, and expenses incurred in the prosecution of this action. The Court will thereafter set down the matter for hearing.

The costs of this action are hereby taxed against the Defendant.

Done this 30th day of January, 2004.

s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 22, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-11409-FF

JOSEPH R. CAMPBELL,
MARILYN CAMPBELL,

Plaintiffs-Appellees,

versus

RAINBOW CITY, ALABAMA,

Defendant-Appellant.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before CARNES and PRYOR, Circuit Judges, and FORRESTER*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the

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* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

Appendix D

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Eli Carnes
UNITED STATES CIRCUIT JUDGE

(2)

No. 06-358

FILED
OCT 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSEPH R. CAMPBELL and MARILYN L. CAMPBELL,

Petitioners,

v.

RAINBOW CITY, ALABAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether compelling reasons have been shown for this Court to grant certiorari, where plaintiffs fail to show that the Eleventh Circuit's analysis of their claims conflicts with any holding of this Court or of a circuit court of appeals, or of a state court of last resort.

2. Whether compelling reasons have been shown for this Court to grant certiorari, where the Eleventh Circuit found that plaintiffs failed as a matter of law to offer sufficient evidence to go to the jury on their First Amendment and equal protection claims.

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I

STATEMENT OF THE CASE

Two years after he ran unsuccessfully for mayor of Rainbow City, Petitioner Joseph Campbell and his wife, Petitioner Marilyn Campbell, sought to develop property they owned in Rainbow City, Alabama, into a large apartment complex. They met with the mayor and then with the planning commission on numerous occasions but did not receive the necessary approvals from the planning commission to build on their property. They later sought a number of variances from the Rainbow City Board of Adjustment, which denied their variance requests.

Claiming that Campbell's criticism of the mayor during his run for office formed the basis for the thwarting of their development plans, Petitioners filed suit claiming that Rainbow City had violated their equal protection rights under the Fourteenth Amendment and their First Amendment rights, retaliating against them for Mr. Campbell's outspoken criticism of the incumbent mayor two years earlier.

The case proceeded to trial and a jury returned a verdict for the plaintiffs.

Rainbow City appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the district court had erroneously denied their Rule 50 motion for judgment as a matter of law.[1]

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1. The City also appealed the district court's ruling on several other grounds, but these grounds were not addressed because the appeals court concluded that the district court should have granted the Rule 50 motion.

The Eleventh Circuit reversed the trial court, finding that plaintiffs had failed as a matter of law to prove their claims. First, the court held, the plaintiffs failed as a matter of law to show that the City's final policymaker acted with an unconstitutional motive, and thus no reasonable jury could find that the City violated the plaintiffs' First Amendment rights. Secondly, the court found that the plaintiffs had not offered sufficient evidence of similarly-situated individuals who were treated differently from them, and thus did not make out an equal protection claim. The court reversed the trial court and directed it to enter judgment in favor of the City.

Plaintiffs petitioned for rehearing in the Eleventh Circuit, but their petition was denied.

REASONS FOR DENYING THE PETITION

I. Plaintiffs have failed to carry their burden to show that the Eleventh Circuit's analysis of their claims conflicts with any holding of this Court, of a circuit court of appeals, or a state court of last resort.

First, plaintiffs argue that the Eleventh Circuit's opinion is in conflict with that of the First Circuit in *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992). The conflict, according to plaintiffs, is that in *Nestor*, the First Circuit found that those plaintiffs' evidence rose to the level of a triable issue, because there was hostility to plaintiffs' partisan political views and affiliation, and because a residential site for which a site permit was denied was essentially similar to other projects for which permits had been routinely granted. *Id.* at 39. In the case below, however, the Eleventh Circuit found simply that the plaintiffs had failed

to raise an issue of genuine material fact to establish similarly situated comparators who were treated better than plaintiffs.[2] There is no conflict presented by the holdings of the First Circuit in *Nestor* and the Eleventh Circuit in this case. The respective appellate courts merely found different facts.[3]

Furthermore, plaintiffs' argument regarding the alleged conflict between *Nestor* and this case is superfluous. The question before the Eleventh Circuit was not whether the facts raised a question of retaliation, which is what the First Circuit discussed in *Nestor*. In this case, the Eleventh Circuit assumed, for purposes of argument, that retaliation had indeed been properly shown by the plaintiffs. *Campbell*, 434 F.3d at 1313, Pet. Appx. 10a. The issue upon which the Eleventh Circuit reversed was the plaintiffs' proof *vel non* that the planning commission, the final policymaker, acted with improper motive. *Id.*

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2. The Eleventh Circuit's discussion of similarly situated comparators is in its equal protection discussion, found at 434 F.3d 1306, 1313-1317 (11th Cir. 2006) and at Pet. Appx. 12a.

3. Actually, in *Nestor* the First Circuit ruled only that the plaintiffs' residential permit First Amendment claim survived what the First Circuit said was the 12(b)(6) standard which had been effectively applied by the trial court, and that the plaintiffs' residential permit claim had been "pleaded with sufficient particularity to entitle" plaintiff to survive an early summary judgment. The court went on to say that, "the facts in support of [plaintiff's] allegation that permits were routinely granted for other, similar properties are, at best, sketchy. There is merely a short list of other projects which were approved, giving almost no explanation of how these projects were similar to [plaintiff]'s project. . . . However, because the district court denied further discovery on this point, we think the appropriate course is to remand for such discovery. After discovery is completed, defendants may renew their motion for summary judgment." *Nestor*, 964 F.2d at 41.

Thus the plaintiffs' suggestion that *Nestor* conflicts with the Eleventh Circuit's decision in the instant case is wrong. Moreover, plaintiffs' discussion of *Nestor* and its holding really has nothing to do with anything pertinent to whether there are compelling reasons for this Court to grant certiorari.

In their argument 2,[4] plaintiffs allege that the Eleventh Circuit erred in not recognizing the "rubber stamp" theory as it impacts the determination of the final policymaker for a municipality. The plaintiffs aver that the Eleventh Circuit does not recognize the "rubber stamp" theory, while other circuits do.[5]

Again plaintiffs' argument is misplaced. Nowhere in the Eleventh Circuit's opinion does the court decide whether or not the "rubber stamp" theory is a valid method of finding liability. The court simply found that there was no evidence that the planning commission, the final policymaker, knew of any unconstitutional motive on the part of the mayor, nor that the planning commission ratified any unconstitutional motive on the part of the mayor. Without any such evidence showing that a majority of the members of the commission, the final policymaker, acted with an unconstitutional motive, the trial court erred in denying the Rule 50 motion. *Id.*

Boiled down, the plaintiffs' argument is nothing more than a disagreement with the Eleventh Circuit on what constitutes sufficient evidence to create a jury issue. According to Rule 10 of the rules of this Court, such

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4. *See* Petition at 9.

5. Citing *Johnson v. State of Louisiana*, 369 F.3d 826 (5th Cir. 2004); *Beatty v. Madison County School District*, 254 F.3d 595 (5th Cir. 2001).

disagreement over fact findings rarely constitutes the basis for this Honorable Court to grant a petition for certiorari. *See* Rule 10, Rules of the Supreme Court of the United States.

Besides that, the Eleventh Circuit's opinion shows that it was well aware of the possible application of the "rubber stamp" theory, by virtue of the cases cited by the court. Both *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002) and *Scala v. City of Winter Park*, 116 F.3d 1396 (11th Cir. 1997) discuss at length the municipal liability theories of delegation and ratification. A cursory review of *Matthews* and *Scala* shows that in its holding, the Eleventh Circuit properly required evidence that the commission itself, and not just one member, acted with an unconstitutional motive. The Eleventh Circuit simply found, and clearly found, that there was no sufficient evidence that the commission itself held an improper motive, or even knew of an improper motive.

Again, plaintiffs' argument fails to provide any compelling reasons why this Honorable Court should grant certiorari. They have failed to show that the Eleventh Circuit's municipal liability reasoning conflicts with any authority, this Court or that of any circuit court. Their arguments in #2 simply constitute factual disagreements with the Eleventh Circuit findings.

II. Plaintiffs fail to show compelling reasons as they have failed to point out any errors of moment in the Eleventh Circuit's analysis of their claims.

Arguments 3 and 4 of plaintiffs' petition[6] constitute further factual argument by plaintiffs. They point to an erroneous explanation by the Eleventh Circuit that, "the plaintiffs' own property is not similarly situated to itself!" but fail to show how the Eleventh Circuit's findings and its application of the law thereto so far depart from the accepted and usual course of judicial proceedings that a summary reversal should be issued. As such argument 3 takes great issue with the Eleventh Circuit's treatment of the similarly situated requirement, as well as the differing treatment requirement. That is, the Eleventh Circuit required plaintiffs to show that they were 1) similarly situated to other developers but 2) received different (and adverse) treatment. Plaintiffs did not make the required showing to satisfy this test, and thus their claims failed.

Argument 4 of plaintiffs is simply more disagreement with the appellate court's review of the sufficiency of the evidence.

Thus plaintiffs' arguments again present no compelling reasons for this Court to grant certiorari. Their arguments consist of factual disagreements and their general disquiet with the Eleventh Circuit's findings that plaintiffs had not presented sufficient evidence to support their claims. Their arguments suggest no conflicts of law; suggest no important federal questions which have been decided improperly; and show no departure from the accepted and usual course of judicial proceedings so as to warrant this Court's review.

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6. *See* Petition at 13 and 15, respectively.

III. Other reasons to deny the petition, and misstatements of fact and law contained in petitioners' brief.

In accordance with Rule 15.2 of the Supreme Court rules, respondent avers herein that there are further reasons for denying the petition and that there are several misstatements of fact and law in petitioners' brief.

In their "Questions Presented for Review" section, petitioners say that implicit in the issues is the question whether the Eleventh Circuit may create an artificial barrier to effectively insulate wrongdoing by municipal officials in power.[7] As with several other arguments put forth by petitioners, such phrasing begs the question. The Eleventh Circuit found that there was no evidence of any animus by the final policymaker, the planning commission for Rainbow City. In requiring animus by the final policymaker, the Eleventh Circuit's decision is in accord with well established case law regarding municipal liability under federal law.

Several comments by plaintiffs in their "conclusion" paragraph require response. First, the plaintiffs claim that by the City's tabling of their proposals, the city attorney, the City, and the City's insurance carrier were opposing a reasonable development. As plaintiffs well know, no mention of the City's insurance carrier is made in the trial record or the record on appeal. It is simply vexatious mention of liability insurance for obvious purposes. It is due to be struck and not considered.

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7. *See* "Questions Presented for Review" at i of Petition for Certiorari.

The petitioners also complain that the Eleventh Circuit oral arguments were not about "those items we were told to brief on, but instead were an attack on the character, intelligence, and motivation of the plaintiffs in a blatant disrespect for the judgment and opinions of law" of the trial judge. Such is not reflected anywhere in the record, and there is no attempt by plaintiffs to document it as such.

The petitioners further make mention of appellate mediation, which is in itself completely improper. The petitioners being "willing to negotiate in good faith" is, of course, not reflected anywhere in the record nor should it be. They further insinuate with their comments that the Eleventh Circuit had reasons "beyond the legal" for its actions.[8]

They finally request this Court consider a summary reversal of the Eleventh Circuit's opinion, as the opinion is "so erroneous that a briefing and argument may be a waste of time."

In response, respondent avers that while plaintiffs' venting of their proverbial spleen may be understandable, it is entitled to occupy no place in court. It is particularly not entitled to be placed before this Honorable Court.

And, despite the inequities they say they suffered at the hands of the United States Court of Appeals for the Eleventh Circuit, plaintiffs nonetheless show no more compelling reasons for this Court to grant certiorari than they presented in the earlier parts of their petition. When all is said and done, they fail to present sufficient reason why this Court,

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8. *See* petition at 16, 17.

with the way that it reviews cases, should grant the petition for certiorari. There are no conflicts within the federal circuits to resolve, and there is no significant federal question. The case is simply one of failure to provide sufficient evidence for the claims to go to the jury.

CONCLUSION

For the above and foregoing reasons, this Honorable Court should DENY the plaintiffs' petition for certiorari.

Respectfully submitted,

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